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No. 90-808

FILED
FEB 20 1991
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In the Supreme Court of the United States

OCTOBER TERM, 1990

STANLEY PLESINSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction must be reversed because an attorney who assisted in the prosecution was appointed by a subordinate official of the Department of Justice, pursuant to a delegation by the Attorney General of his appointment authority, rather than by the Attorney General personally.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 8659-8674) is reported at 912 F.2d 1033.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. The petition for a writ of certiorari was filed on November 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Petitioner entered a conditional plea of guilty in the United States District Court for the Central District of California to the charge of conspiring to

possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to nine years' imprisonment. The court of appeals affirmed.

1. The evidence ~~at trial,~~ the sufficiency of which is not in dispute here, showed that from at least 1985 until 1988, petitioner conspired to possess several thousand pounds of Mexican marijuana with the intent to distribute it. Petitioner's co-conspirator, Ivan Summers, negotiated with the suppliers and arranged for the marijuana to be delivered; petitioner accepted delivery of the marijuana and distributed it to others. In 1988, a confidential informant negotiated with petitioner to purchase 1000 kilograms of marijuana. In May 1988, petitioner accepted delivery of approximately 1000 kilograms of marijuana and made a $35,000 down payment on the purchase price. Gov't C.A. Br. 4-5.

2. The issue in this case involves the manner in which Sanford Feldman, a Deputy Attorney General for the State of California, was appointed to assist in the prosecution of petitioner. The relevant facts are stated in the court of appeals' opinion. Pet. App. 8662-8665. On September 19, 1986, Feldman was appointed as a Special Assistant U.S. Attorney by Brian Meyers, Deputy Director of the Office of Attorney Personnel Management in the Department of Justice. Feldman's appointment was subsequently extended by Meyers through April 30, 1988. On May 2, 1988, Meyers' successor as Deputy Director, Mark Wilkoff, extended Feldman's appointment through April 30, 1989. *Id.* at 8662-8664.

The authority for Feldman's appointment as a Special Assistant U.S. Attorney had its source in 28 U.S.C. 543, which provides: "The Attorney General may appoint attorneys to assist United States at-

torneys when the public interest so requires." Under 28 U.S.C. 510, the Attorney General "may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." In 1981, pursuant to 28 U.S.C. 510, the Attorney General delegated his authority to appoint attorneys under 28 U.S.C. 543 to the Associate Attorney General, who in turn was authorized to "redelegate" that authority to "the official in the Office of the Deputy Attorney General responsible for attorney personnel management." 28 C.F.R. 0.19 (1981). In accordance with the latter provision, the Associate Attorney General subdelegated his appointment authority to the Director of the Office of Attorney Personnel Management. Thereafter, as authorized by another order of the Attorney General, 28 C.F.R. 0.15(e)(2) (1988), the Director of that Office further delegated the appointment authority to the Deputy Director.

On February 24, 1988, the Attorney General published an order transferring the appointment authority under Section 543 from the Associate Attorney General to the Deputy Attorney General, who had possessed that delegated authority prior to 1981. 28 C.F.R. 0.15(b)(1)(v) (1988). Although the regulations permitted the Deputy Attorney General to "redelegate" that authority to the Director of the Office of Attorney Personnel Management, 28 C.F.R. 0.15(c) and (e), the Deputy Attorney General did not do so until January 31, 1989. The second extension of Feldman's appointment, by Deputy Director Wilkoff in May 1988, occurred after the February 1988 transfer of appointment power to the Deputy Attorney General but before the January 1989 redelegation to the Director. Pet. App. 8663.

3. On May 18, 1988, a four-count indictment was filed against petitioner. Superseding indictments were filed on September 9, 1988, and January 12, 1989. Petitioner moved to dismiss the indictment or in the alternative to disqualify Feldman, on the ground that Feldman was not authorized to act as a Special Assistant U.S. Attorney after April 30, 1988, because he did not take a new oath of office when he was reappointed on May 2, 1988. E.R. 31-33.[1] In a supplemental memorandum, petitioner argued that 28 U.S.C. 543 does not permit the Attorney General to delegate his authority to appoint attorneys to assist U.S. Attorneys, and that the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2) would not in any event permit such a delegation. E.R. 36-43.

On February 6, 1989, the district court orally denied petitioner's motion. Pet. App. 8664. Although the court concluded that Feldman was not properly authorized to appear before the court after April 30, 1988, it declined to dismiss the indictment on that ground because it found that Feldman's unauthorized participation in the indictment process was "harmless." *Ibid.* In response to petitioner's alternative request to disqualify Feldman, the court found that Feldman acted at all times under the supervision of an Assistant U.S. Attorney, and on that basis the court declined to "undo that which [had] already been done with regard to the [previously decided] motions." *Ibid.* The court similarly denied petitioner's request to order that Feldman not participate in the proceedings in the future, although it

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[1] "E.R." refers to the excerpt of record filed in the court of appeals.

indicated that he would not be qualified to do so if the defective appointment was not cured. *Ibid.*

Following the district court's denial of his motion to dismiss the indictment or disqualify Feldman, petitioner entered a conditional plea of guilty to one count of the indictment on February 8, 1989, preserving his right to appeal the denial of the motion. At the government's request, the remaining counts were dismissed. On February 9, 1989, following the Deputy Attorney General's order delegating his appointment authority under 28 U.S.C. 543 to the Director of the Office of Attorney Personnel Management, Feldman was reappointed as a Special Assistant U.S. Attorney by the Director. Feldman subsequently appeared on behalf of the government at petitioner's sentencing. Pet. App. 8665.

4. The court of appeals affirmed petitioner's conviction. Pet. App. 8659-8674. As a threshold matter, it ruled that petitioner could challenge Feldman's authority to assist in the prosecution as a ground for setting aside his conviction on direct appeal. See Pet. App. 8665-8667. On the merits, the court rejected petitioner's contention that the Appointments Clause requires that the Attorney General personally exercise the authority conferred by 28 U.S.C. 543 to appoint attorneys to assist U.S. Attorneys. Pet. App. 8667-8669. The court held that 28 U.S.C. 510, which authorizes the Attorney General to delegate "any" of his functions, permits the Attorney General to delegate his appointment power under Section 543, since "[t]here is no indication Congress meant to exclude the Attorney General's section 543 appointment power from his otherwise unqualified statutory statutory authorization of delegation." Pet. App. 8668-8669. The court found this conclusion to be supported by decisions upholding the Attorney General's

delegation of his parallel authority under 28 U.S.C. 515(a) to appoint special assistants to the Attorney General. Pet. App. 8669.

The court of appeals also addressed several other arguments raised by petitioner. First, it agreed with petitioner that Feldman was not authorized to act as a Special Assistant U.S. Attorney after his appointment lapsed on April 30, 1988, since there was no delegation of appointment authority from the Deputy Attorney General to the Director of Attorney Personnel Management between then and January 31, 1989. Pet. App. 8669-8670. However, the court held that Feldman's unauthorized appearance on behalf of the government during that time did not deprive the district court of jurisdiction and require reversal of petitioner's conviction, because Feldman testified that he "was at all times acting under the direction and supervision of an Assistant U.S. Attorney." *Id.* at 8670-8671. Second, the court held that Feldman's unauthorized presence before the grand jury did not require dismissal of the indictment because there was no showing of prejudice. Pet. App. 8671-8672 (citing *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986), and *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256-257 (1988)). Third, the court held that Feldman's participation did not require the district court to reconsider motions it had decided previously. The court of appeals noted that although Feldman may have prepared and argued the government's response to several of petitioner's pretrial motions, his actions were subject to the supervising Assistant U.S. Attorney's approval and he did not make the final decisions in connection with the prosecution. Pet. App. 8672-8673.

ARGUMENT

The court of appeals properly declined to set aside petitioner's conviction on the ground that Sanford Feldman, who assisted in the prosecution, was not personally appointed by the Attorney General under 28 U.S.C. 543. The decision below does not conflict with any decision of this Court or of another court of appeals. Further review therefore is not warranted.

1. Even if petitioner's objection to the manner in which Feldman was appointed had merit, it would not furnish a basis for setting aside his conviction—at least in the absence of some showing of prejudice. By law, it is the United States Attorney who is vested with the power to prosecute crimes. Specifically, 28 U.S.C. 547(1) provides that "[e]xcept as otherwise provided by law, each United States attorney, within his district, shall * * * prosecute for all offenses against the United States." Consistent with that directive, the indictment in this case was returned in the name of the United States Attorney, and government motions were filed in his name. See E.R. 6, 14, 22, 44, 50, 97, 157. Petitioner does not contend that there was a statutory or constitutional defect in the manner in which the U.S. Attorney was appointed, and 28 U.S.C. 541(a) in fact provides, consistent with the Appointments Clause, that the President shall appoint each U.S. Attorney with the advice and consent of the Senate.

Under 28 U.S.C. 543, the Attorney Geenral is authorized to "appoint attorneys to assist United States attorneys when the public interest so requires." Feldman thus was appointed in this case only to assist the U.S. Attorney in carrying out the latter's responsibilities. Where, as here, the prosecution was under the control of a validly appointed Officer of the

United States, a defendant should not be entitled to challenge his conviction by challenging the government's method of selecting the person upon whom that Officer chose to rely for assistance in the prosecution. As the court below recognized, Pet. App. 8671, this case therefore differs from *United States* v. *Providence Journal Co.*, 485 U.S. 693 (1988), where the Court held that it lacked jurisdiction because the case had not been brought to it by a "proper representative of the Government." *Id.* at 708.[2]

The court of appeals concluded that Feldman was at all times under the direction and supervision of an Assistant U.S. Attorney, whose participation in the prosecution petitioner has never challenged. Pet. App. 8670-8671, 8672-8673. The court of appeals relied on Feldman's subordinate status in concluding

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[2] As the Court noted in *Providence Journal*, the Solicitor General is vested by statute with the authority to conduct cases in this Court on behalf of the government. 28 U.S.C. 518. Nothing in *Providence Journal* suggests, however, that an opposing party would have a basis to move to dismiss a certiorari petition validly filed in the name of the Solicitor General on the ground that it had been drafted by an "Assistant to the Solicitor General" who had not been properly appointed to his position. In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), although the Court set aside a contempt conviction because the attorney for an interested private party had been appointed by the court "to be in control of the prosecution," it emphasized that private counsel's familiarity with the case could "be put to use in *assisting* a disinterested prosecutor in pursuing the contempt action." 481 U.S. at 806 n.17; see *Person* v. *Miller*, 854 F.2d 656, 662-664 (4th Cir. 1988) (sustaining contempt conviction where counsel for interested private party participated in proceeding under control of U.S. Attorney), cert. denied, 489 U.S. 1011 (1989).

that although he was not validly appointed under Justice Department regulations between April 30, 1988, and February 9, 1989, petitioner's conviction should not be set aside on account of Feldman's unauthorized participation, because the Assistant U.S. Attorney was a proper representative of the government who was responsible for the conduct of the trial. See *id.* at 8670-8671 (citing *Home News Publishing Co.* v. *United States*, 329 F.2d 191, 193 (5th Cir. 1964), and *United States* v. *Denton*, 307 F.2d 336, 338-339 (6th Cir.), cert. denied, 371 U.S. 923 (1962)). See also *Wall* v. *United States*, 384 F.2d 758, 763 (10th Cir. 1967). For similar reasons, the court of appeals correctly concluded that what it found to be Feldman's unauthorized presence before the grand jury, in violation of Fed. R. Crim. P. 6(d), did not require dismissal of the indictment, since petitioner did not show that Feldman's presence "substantially influence[d]" the grand jury's decision to indict him or that the grand jury proceedings were fundamentally unfair as a result. Pet. App. 8671-8672 (quoting *United States* v. *Mechanik*, 475 U.S. 66, 78 (1986) (O'Connor, J., concurring)).[3] See also *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988) (district court may not dismiss indictment for errors in grand jury proceedings unless errors prejudiced defendant). Petitioner does not challenge these determinations by the district court that he was not prejudiced by Feldman's participation. The certiorari petition should be denied on the foregoing grounds alone.

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[3] The court of appeals and petitioner accepted the government's representation in this case that "Feldman did not say or do anything nor did anyone make reference to him in front of the grand jury." Pet. App. 8672 n.9.

2. Petitioner's contention (Pet. 8-13) that the Attorney General is barred by statute from delegating his appointment authority under 28 U.S.C. 543 is without merit. Under 28 U.S.C. 510, the Attorney General may "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." There is nothing in that all-inclusive language to suggest that the function of the Attorney General under 28 U.S.C. 543 of appointing attorneys to assist U.S. Attorneys is excluded from Section 510's delegation authorization. Nor has petitioner pointed to any such suggestion in the legislative history of Section 510. Congress enacted Section 510 in the same subsection of the same public law in which it enacted Section 543. See Act of Sept. 6, 1966, Pub. L. No. 89-554, § 4(c), 80 Stat. 612, 618. If Congress had intended to exempt the latter Section from the scope of the former, it presumably would have included a provision to that effect in the text of Section 510 itself. Petitioner's notion that Congress would have wanted to exclude the appointment authority from the delegation it permitted by Section 510 is further undermined by the fact that in Section 1 of the same public law (80 Stat. 379), Congress also enacted 5 U.S.C. 302(b)(1), which provides that the head of an Executive agency may "delegate to subordinate officials the authority vested in him by law to take final action on matters pertaining to the employment * * * of personnel under his agency."

Petitioner nevertheless contends (Pet. 9-11, 12) that Section 543 requires the Attorney General personally to exercise the authority to appoint attorneys to assist U.S. Attorneys, thereby precluding the Attorney General from relying on his delegation au-

thority under Section 510. Nothing in the text of Section 543 suggests that it bars the Attorney General from exercising the broad power of delegation conferred on him by Section 510, and petitioner cites nothing in its legislative history to that effect. Instead, petitioner relies (Pet. 9-11) on the legislative history of the 1870 Act of Congress establishing the Department of Justice, which contained a similar provision. Act of June 22, 1870, ch. 150, § 17, 16 Stat. 164-165.

The legislative history of an 1870 statute is of little value in determining whether 28 U.S.C. 510, which was enacted in 1966, applies to the appointment authority in 28 U.S.C. 543, which was also enacted in 1966. In any event, however, the legislative history on which petitioner relies does not address the delegation issue. The subjects under discussion in the passages petitioner quotes were the need to limit expenditures for and ensure control over lawyers hired from outside the government, and whether the Attorney General, rather than the Heads of other Departments, such as the Interior Department or the Treasury Department, should be responsible for hiring lawyers to represent those other Departments. Representative Jenckes, on whose remarks petitioner relies, was making the point that vesting the authority to appoint such attorneys in the Attorney General was consistent with the Attorney General's responsibility, as the "chief law officer of the government," to represent the United States in all legal matters. See Pet. 10-11. Nothing in Representative Jenckes's defense of the arrangement that was ultimately enacted into law is inconsistent with the proposition that the Attorney General might delegate his appointment authority to a subordinate official in the Department of Justice, subject to his supervision and control as the chief law officer.

Finally, petitioner's reliance (Pet. 11-12) on *United States* v. *Giordano*, 416 U.S. 505 (1974), is misplaced. There the Court concluded that specific statutory language restricting the authority to apply for a wiretap authorization to "[t]he Attorney General, or any Assistant Attorney General specifically designated by the Attorney General," 18 U.S.C. 2516(1), was intended to preclude delegation of the wiretap-application authority to any Justice Department official other than those named. For that reason, the Court concluded that the Attorney General could not rely on his general delegation authority under Section 510 to delegate the wiretap-application authority to other Justice Department officials. 416 U.S. at 513-514. Section 543, by contrast, does not address the subject of delegation and therefore does not displace the general delegation authorization in Section 510. Significantly, the Court in *Giordano* found "unexceptionable" the proposition that the more usual phrasing of a grant of authority to "the Attorney General," as in Section 543, is not to be construed as precluding the Attorney General from delegating that authority pursuant to Section 510. 416 U.S. at 513-514. *Giordano* therefore lends no support to petitioner's argument that the Attorney General is barred as a statutory matter from delegating his authority to appoint attorneys to assist U.S. Attorneys.

Despite thousands of hiring decisions made under Section 543 by delegatees of the Attorney General over the years,[4] petitioner has cited no case, and we

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[4] We have been informed by the Executive Office for United States Attorneys in the Department of Justice that there are approximately 2100 appointments currently in effect under 28 U.S.C. 543 alone.

have found none, suggesting that the Attorney General is foreclosed from delegating his authority under 28 U.S.C. 543 to appoint attorneys to assist U.S. Attorneys. As the court below recognized, other courts have rejected the essentially identical argument that Section 510 does not authorize the Attorney General to delegate his parallel power under 28 U.S.C. 515(a) to appoint special assistants to the Attorney General. See Pet. App. 8668-8669 (citing *United States* v. *Cravero*, 545 F.2d 406, 410 (5th Cir. 1976), cert. denied, 430 U.S. 983 (1977), and *United States* v. *Agrusa*, 520 F.2d 370, 372 (8th Cir. 1975)).

3. Petitioner argues (Pet. 7, 13-15) that the Appointments Clause of the Constitution bars the Attorney General from delegating his power under 28 U.S.C. 543 to appoint attorneys to assist U.S. Attorneys. The first portion of that Clause provides that the President shall nominate and, with the advice and consent of the Senate, shall appoint all "Officers of the United States" whose appointments are not otherwise provided for in the Constitution itself and which shall be established by law. The second portion of the Clause provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Petitioner contends (Pet. 7) that Feldman was an "Officer of the United States," relying on the holding in *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976), that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed in a manner prescribed by § 2, Cl. 2, of

[Article II]." In petitioner's view, Feldman was an "inferior Officer" within the meaning of the Appointments Clause, and under the second portion of the Clause had to be appointed by the "Head of [the] Department" (the Attorney General) personally, not by a subordinate official pursuant to a delegation by the Attorney General of his appointment authority. Petitioner's theory apparently would require that all of the several thousand attorneys in the Department of Justice, or at least those who appear in court on behalf of the government, must be appointed by the Attorney General personally. The Constitution does not place such rigid constraints on the Attorney General.

There is a significant difference between this case and *Buckley* v. *Valeo*. In *Buckley*, Congress had vested various powers, including the conduct of litigation, directly in officials who were not themselves appointed in conformity with the Appointments Clause and thus were not proper "Officers of the United States." Here, the "significant authority pursuant to the laws of the United States" (*Buckley*, 424 U.S. at 126) that is at issue—the power to prosecute offenses against the United States—is vested by Act of Congress directly in the U.S. Attorney, who is an "Officer of the United States" and who is appointed in conformity with the Appointments Clause. See 28 U.S.C. 541(a). Moreover, the U.S. Attorneys (as well as Assistant U.S. Attorneys and attorneys appointed under 28 U.S.C. 543) are expressly subject by law to the direction of the Attorney General, see 28 U.S.C. 516, 519, who is a superior Officer of the United States subject to the President's immediate control. Thus, unlike in *Buckley*, there can be no contention here that Con-

gress has sought to remove the power to conduct litigation involving the government from the control of accountable officials of the Executive Branch—and, more specifically, from Officers of the United States. The question here, rather, concerns the status of an attorney within a Department of the Executive Branch who participates in litigation under the control of the Attorney General and the U.S. Attorney.

We do not question that the assignment of responsibilities within an Executive Department must be consistent with the principles of *Buckley*. It does not follow from this premise, however, that *all* attorneys who participate in any way in the conduct of litigation must be Officers of the United States in the constitutional sense.

Attorneys appointed under Section 543 merely assist the U.S. Attorney, who remains vested with his full power and responsibility under 28 U.S.C. 547(1) for the prosecution of all criminal offenses against the United States within his district. Accordingly, nothing in the nature of an appointment under Section 543 necessarily requires that an attorney receiving such an appointment will assume the sort of control over the investigation or prosecution that would satisfy the *Buckley* standard of "exercising significant authority pursuant to the laws of the United States." [5] In this case, the court of appeals accepted the government's evidence and representations that Feldman played no active role whatever in the grand jury proceedings, "did not make the final decisions in connection with the prosecution," and "was at all times acting under the direction and supervision of an Assistant U.S. Attorney," whose participation in the

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[5] Cf. 13 Op. Att'y Gen. 516, 521 (1871); *United States* v. *Smith*, 124 U.S. 525, 531-532 (1988).

grand jury investigation, indictment, and prosecution has never been challenged by petitioner. Pet. App. 8670-8671, 8672-8673 & n.9.[6]

Even if Feldman was an "inferior Officer," that would not render his participation unlawful unless the Appointments Clause required his appointment to be made personally by the Attorney General, as petitioner maintains. Petitioner, however, has not cited any authority holding that the Appointments Clause bars the Attorney General from delegating the authority vested in him to appoint inferior Officers within the Department of Justice. Certainly nothing in the text of the Clause forecloses that result. The Clause merely provides that "the Congress may by Law vest the Appointment of * * * inferior Officers * * * in the Heads of Departments." Section 543 is consistent with that requirement, because it vests the appointment of attorneys to assist U.S. Attorneys in the Attorney General. The Appointments Clause does not address the question whether the Attorney General may delegate his appointment power to his subordinates.

Nonetheless, the principle of delegation of vested powers may fairly be said to be inherent in Article II. That Article states that "The executive Power shall be vested in the President of the United States of America," Art. II, § 1, Cl. 1, but it has long been recognized that "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Myers* v. *United States*, 272 U.S. 52, 117 (1926) (quoted in *Buckley*, 424 U.S. at 135). The Appointments Clause itself

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[6] The Attorney General's authority under 28 U.S.C. 542 to appoint Assistant U.S. Attorneys has also been delegated to the Deputy Attorney General. 28 C.F.R. 0.15(b)(1)(v).

recognizes that practical reality, by allowing Congress to provide for the President's immediate subordinates in the Executive Branch, the Heads of Departments, to make appointments of inferior Officers. If the Framers had intended to make a special nondelegation exception applicable to the appointment power in that portion of the Appointments Clause, it is reasonable to expect that they would have made that exception express.[7]

We do not suggest by the foregoing discussion that the President may delegate specific powers that are assigned to him directly by the Constitution itself, such as the power to approve or disapprove bills, grant pardons, serve as Commander-in-Chief, or even to nominate, and with the advice and consent of the Senate, to appoint officers covered by the first portion of the Appointments Clause. The text and structure of the Constitution have been understood to contemplate that those powers must be exercised by the President personally. See 7 Op. Att'y Gen. 453, 464-465 (1855); 5 Op. Off. Legal Counsel 91, 93-94 (1981).[8]

The second portion of the Appointments Clause confers power on Congress to assign appointment au-

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[7] The Appointments Clause refers in another phrase to Congress's vesting of the appointment of inferior Officers "in the President alone," but in context that phrase is clearly intended to mean appointment by the President without the advice and consent of the Senate.

[8] Thus, petitioner is incorrect in arguing (Pet. 13) that under the court of appeals' decision, the President could delegate his power to appoint Justices of this Court to the Attorney General. The first portion of the Appointments Clause requires in all instances that Justices, Ambassadors, and other Public Ministers be appointed by the President, with the advice and consent of the Senate.

thority. There is nothing in the text or structure of the Appointments Clause suggesting that when Congress vests appointment authority in a Department Head, that authority may not be delegated to a subordinate official. If the Department Head delegates the appointment authority vested in him by law, the responsibility and accountability for the exercise of that power remains in the Department Head, in accordance with the constitutional design. As the D.C. Circuit put it in *Andrade* v. *Regnery*, 824 F.2d 1253, 1257 (1987): "[I]t is an everyday occurrence in the operation of government for staff members to conceive and even carry out policies for which duly appointed or elected officials take official responsibility. Our government in fact depends on such delegation of responsibility, and it does not offend the Appointments Clause so long as the duly appointed official has final authority over the implementation of the governmental action."

Petitioner points out (Pet. 13-14) that during the debates on the Appointments Clause in the Constitutional Convention, recited in *Buckley*, 424 U.S. at 129-131, and *Morrison* v. *Olson*, 487 U.S. 654, 675 (1988), there was a suggestion by James Madison that what is now the "inferior Officer" portion of the Clause "did not go far enough, in that it did not allow Congress to vest appointment powers in 'Superior Officers below Heads of Departments.'" 487 U.S. at 675 (quoting 2 *Records of the Federal Convention of 1787*, at 627-628 (M. Farrand ed. 1966)). Madison's comment, however, dealt with the situation where Congress itself might seek to vest the appointment authority directly in a subordinate officer, rather than in the Head of the Department. Such a law could significantly interfere with the

Department Head's ability to direct the affairs of his Department, and we agree with petitioner that it would be unconstitutional. See 4 Op. Att'y Gen. 162, 164 (1843); 7 Op. Att'y Gen. 242, 276 (1855); *id.* at 495, 512 (1855); 11 Op. Att'y Gen. 209, 213 (1865); cf. *United States* v. *Mouat*, 124 U.S. 303, 308 (1888); *United States* v. *Smith*, 124 U.S. 525, 532-533 (1888). But it does not follow from that premise that a law vesting authority to appoint inferior Officers directly in the Head of a Department, but allowing the Department Head to delegate that authority as he chooses, suffers from any constitutional flaw. The critical distinction is that a law of the latter sort would preserve the ability of the Department Head to control the affairs of his Department.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20392